STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2011
v	No. 296708 Jackson Circuit Court
APOLLO DEWAYNE JOHNSON, Defendant-Appellant.	LC No. 09-005554-FH

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of prisoner in possession of a weapon, MCL 800.2834. Defendant was sentenced as a habitual offender-fourth offense to four to ten years' imprisonment, to be served consecutively to another case on which he had just been sentenced. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred by permitting evidence of other bad acts, including allegations of prior possession of contraband by defendant and that his counsel was ineffective for failing to object. The testimony about which defendant objects was given by a prison guard who indicated that he had previously written up defendant for possession of contraband. We find no error in the admission of this testimony.

Defendant's defense was that the prison guard who searched his cell planted the "shank" there. During opening statements, defendant's counsel stated that there was "bad blood" between him and the guard and "that the cell was searched from forty to seventy times in that six to seven month period and never was there anything found inappropriate before." During the prosecution's direct examination of the guard, there was no comment made regarding a prior finding of contraband. Rather, on cross-examination by defense counsel, he asked the guard "in all those times [that the cell was searched in the previous six months] you never found any contraband, correct?" to which the guard replied, "False." Accordingly, it was defendant that initially opened the door regarding the contraband. Defendant's counsel also elicited testimony that defendant and the guard did not get along and that defendant had filed a grievance against the guard.

Accordingly, on redirect, the prosecution elicited testimony that defendant and the guard had an acrimonious relationship because the guard had previously written the defendant up for

possession of contraband, without mentioning what the contraband was, and with the explanation that prisoners often complained about guards who wrote them up. It was defense counsel who then procured the testimony that it was pain pills that was the previously obtained contraband.

Under these circumstances, we find no error. Not only was the testimony necessary to explain the "bad blood" to which defendant was the first to refer, defendant opened the door regarding previous instances of finding contraband with both his opening statement and his initial cross-examination. Even so, the prosecution responded with limited testimony, addressing the citation for contraband without further detail. Again, it was defense counsel who reintroduced the topic and indicated it was pain pills. Thus, it appears that the testimony was narrowly tailored to address the issues brought up by defendant himself, without straying into the irrelevant. Moreover, because the topic was not only originally introduced and expanded by defense counsel, but it was the entire basis for his defense that the guard was setting him up. Accordingly, there can be no reversible error, as "[a] defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

We also find no basis to conclude that defendant's counsel was ineffective for failing to object, particularly given that he was the one eliciting the testimony. Furthermore, even if defendant had argued that his counsel was ineffective for eliciting the testimony, we would find no error, as the testimony helped form the basis of defendant's defense—that the guard had planted the shank based on their bad relationship. Thus, counsel's actions were clearly trial tactics and we will not second-guess them with hindsight. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant's other claim on appeal is that his counsel was ineffective for "failing to challenge the chain of evidence and admission of prison weapon . . . where the exhibit shown to the jury was not in the same condition as [is] evident from phot[o]graphs taken by prison guards . . . ." Defense counsel stipulated to both the chain of evidence and the admission of the shank. Thus, the issue before us is whether these stipulations constituted ineffective assistance of counsel. We conclude that they do not.

Defendant's claim of error revolves around the fact that the shank was covered with an ace bandage and that, although the photograph showed the bandage wrapped further up the weapon, at trial the wrap had moved somewhat. The guard testified regarding these differences, however. During cross-examination by defense counsel, the guard was shown the photograph that he had taken and asked what it depicted, to which he replied "The prison shank." He further testified, "That's how it looked when I pulled it out with the Ace bandage down the handle. It might have slid down when we pulled it out, but it was more like that than like this." Accordingly, the jury was aware that the position of the Ace bandage had been different at the time the shank was found, and there was no evidence that the change reflected a break in the chain of evidence. Further, jurors were unlikely to be misled regarding the ability of the shank to

be used as a weapon simply because the position of the Ace bandage had altered somewhat from when it was originally located. Accordingly, we find nothing ineffective about defense counsel's strategic decision to stipulate to the chain of evidence or the admission of the shank into evidence.[1]

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoesktra
/s/ Michael J. Talbot

[1] Indeed, it is likely that defense counsel elected not to challenge the chain of evidence or the condition of the shank because defendant's defense was that it was planted. Accordingly, whether the shank admitted at trial was the same shank in the same condition was irrelevant to his defense.